



**IN THE HIGH COURT OF KENYA AT ELDORET**

**CRIMINAL CASE NO. 61 OF 2009**

**REPUBLIC ..... PROSECUTOR**

**VERSUS**

**SIMON GAKUO NDUNGU ..... ACCUSED**

**JUDGMENT**

The accused herein, Simon Gakuo Ndungu was charged with the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code. It is alleged that between 20th October, 2006 and 25th October, 2009 at Kapseret Village in Uasin Gishu District within the Rift Valley Province jointly with others not before court murdered Wilson Kiprop Simei.

**EVIDENCE**

The entire prosecution evidence was heard by Hon. Justice A. Mshila before her transfer from Eldoret High Court. I took over the conduct of the trial at defence hearing.

A total of twelve (12) prosecution witnesses testified.

**PW1** was Milton Marowa Sataga, a Pastor from Maranatha Church Kipkaren who stated that he hails from Kipkaren Estate. He told the court that both the accused and deceased were unknown to him and said that on 20th October 2009 at around 11.00 a.m, he had gone to check on his shamba accompanied by his wife Rachael Saragu. On the Ndalat Road, near the Raiply junction, he saw a car (motor vehicle registration no. KAM 516Q) with an open bonnet. On the side, about 3 young men were holding another down. The one man called for help but PW1 could not help him because he was on the other side of the road. The man was bundled up into the vehicle and a man with a motorbike led the way as though going toward Rivatex.

PW1 told the court that a few days later, he was interrogated by police on account that he had witnessed a murder incident. He said that the police required him to write a statement but also added that he could not identify the persons who were wrestling the young man. Later, he stated that he was called to the Divisional headquarters where he was able to identify the accused person.

In cross-examination, the witness told the court that there were about 5 people at the scene of the incident and stated that he could not remember the date when he recorded his statement. He was shown his statement which he identified and confirmed he signed. He stated that he saw 5 people but one was not involved in the wrestling of the victim as he rode a *boda boda*. He clarified that he saw 4 people at the scene, the person being attacked and 3 other people.

**PW2** was James Mwangi Muthara told the court that the accused person was his driver who he had

employed for 6 months, and operated a taxi business near Transmattress in Eldoret. He stated that on 18th October 2009, at around 6.00 p.m his driver took the motor vehicle to do his taxi work. On the next morning, he gave him proceeds of Ksh. 700 and left with the vehicle. PW2 further stated that he saw the accused next on 20th October 2009 at around 8.00 a.m. He stated that the accused told him that he did not find him at home and he gave the money to his brother. PW2 met the accused person the next day when he informed him that he had taken the vehicle to the garage after which he paid and left with the car.

He went on to testify that on 22nd October 2009, he called the accused on his mobile phone but he could not be reached. He proceeded to accused's place where he was told that the vehicle had been taken by the police. He stated that he found the vehicle at Kiamumbi Police Station and when he went there he was arrested. He was asked by the police to produce the driver of the motor vehicle as his car had been involved in a crime. He then gave the police a duplicate of the identification card of his driver. He was taken to court though he was later released.

The witness further testified that his driver was arrested about 3 weeks later in Nakuru. He said that his vehicle KAM 516Q had been detained by the police and that he had its log book which he produced alongside a sale agreement between himself and one Peter Njugu Gachathi. In addition, he told the court that the log book itself was not in his name. It was marked "MFI 1" while the sale agreement was marked "MFI 2". He stated that he tried to call the driver when the car was towed but he had switched off his phone.

In cross-examination, the witness told the court that he did not meet the accused on 20th October 2009 and that it is his brother who did. He stated that his brother had used the proceeds from the taxi given to him by the accused person and the accused had left with the vehicle. PW2 stated that on 21st October 2009, he and the accused person went together to the garage to fix a problem with the vehicle. On 22nd October 2009, he called the accused on his phone but he could not be reached. He was later informed that the vehicle had been towed. He stated that the last time he had spoken to the accused was on 21st October 2009 at 4.00 p.m.

**PW3**, William Kibirech Simei told the court that he hailed from Simat in Wareng District and the deceased person, Wilson Kiprop Simei was his younger brother. He stated that on 20th October 2009, his brother left to go to repair his motorcycle Registration No. KMFC 091H (being a *boda boda* operator) but did not return for several days. On the third day, they had started to look for him and on this same day, they received a report that he had been arrested and taken to Kiamumbi Police Post. When PW3 went there, he did not find him. The deceased's body was later found in Kapseret in a maize plantation where he was directed by unspecified persons on 25th October 2009. The deceased's *boda boda* was never found. PW3 further stated that he did not know who had killed his brother but he escorted the body to the mortuary where a post mortem examination was done on 29th October 2009.

On cross-examination, he stated that he did not know when the deceased died but only knew that he left home on 20th October 2009.

**PW4** was Rachael Sarar from Kipkaren Estate worked as a nursery school teacher and housewife. She testified that on 20th October 2009, she was with her husband and had gone to inspect their shamba when they saw three people fighting with one man. There was a man with a motor bike behind them. In total, there were about 5 people at the scene. The men bundled up the person being beaten into the vehicle and sat on either side of him in the motor-vehicle. She stated that the person with the motor-bike sped past them. As they tried to inquire what had ensued, the men inside the vehicle shouted that the man they saw being beaten was being arrested for knocking down someone at Langas and he was being taken to the police.

PW4 indicated that she could not remember the registration number of the car but she remembered it was small and maroon. She testified that the police went to her house on 22nd October 2009 and she confirmed to them that she and her husband had been at the scene of the incident. She recorded

her statement on 23rd October 2009 but the incident happened so fast that she could not identify the accused person.

On cross-examination, PW4 stated that she was about 50 meters away from where she was able to see the people struggling. She was shown her statement which she identified affirmatively. She stated that the incident occurred at around 11.00 a.m and not at night because people do not go to the shamba at night.

**PW5** No. 232738 Chief Inspector Joshua Emrom Acobolem stationed at Langas Police Station testified that on 22nd October 2009 he heard on police communication system that motor-vehicle Registration No. KAN 516Q was a wanted motor-vehicle. He then went round the Estate to do normal checking and upon reaching Mwanzo spotted the vehicle parked unattended. He made inquiries about the driver of the vehicle and was directed to where he lived. He called Sergeant Kitembe of Kiamumbi Police Post who accompanied him to the home of the driver who had left the vehicle unattended. On arrival there, they only found the driver's wife, Zipporah Wairuguru who told them that the driver had left the house a few moments before the police got there but his whereabouts were unknown to her. She gave them his phone number and accompanied them to where the vehicle had been abandoned.

PW5 went on to state that he left Sergeant Kitembe to handle the matter and went about his normal duties. Three days later, members of the public from the deceased's Keiyo area demanded for the missing person (now the deceased). He told the court that a search was conducted for over 2 days but he was not found. On 25th October 2009, members of the public reported that a dead body had been found in Kapseret and had been taken to Moi Teaching & Referral Hospital mortuary. He went and saw the body which had the hands tied at the back and lying on the stomach. He indicated that the case was taken over by the police at Kiamumbi police station and that he did not know what happened to the deceased's wife Zipporah.

On cross-examination, PW5 told the court that the vehicle was found at Mwanzo estate and he was directed to the place where the driver of the vehicle lived. He reiterated that the deceased's wife confirmed that both the deceased and the driver of the motor-vehicle in question were resident in that area.

**PW6** No. 58268 Sergeant Augustine Kitembe attached to Kapsoya Police testified that he was not the investigating officer in the matter. He stated that the owner of the motor vehicle was charged and later discharged after the driver showed up. The matter was handed over to the flying squad.

**PW7**, No. 66738 police constable Simon Likonyi at Eldoret Scene of Crime support section testified that on 20th October, 2009 the Officer Commanding Flying Squad Inspector Karu requested him to proceed to Kiamumbi Police post and take photographs of motor vehicle KAN 516Q, a maroon Toyota Starlet. The motor vehicle was allegedly used in a kidnapping incident which happened in Kipkaren Estate within Eldoret. He took photographs of the motor vehicle on 24th October, 2009. He later proceeded to Kapseret area where he was shown a decomposing body of a male adult in a maize plantation. He gave description of the clothes on the deceased and stated that his hands had been tied from behind with a rope and a tight knot was also around his neck. Another piece of cloth was tied around his forehead. He produced the photographs and a report on them as exhibits.

**PW8**, Dr. Macharia Benson who worked at Moi Teaching & Referral Hospital as a pathologist performed the autopsy on the body of the deceased- Wilson Kiprop Simeu on 27th October, 2009. It was identified to him by William Simeu and David Ruto. He concluded that the cause of the death was asphyxia (lack of oxygen) due to strangulation. He took a blood sample from the deceased and handed it to the investigation officer for further investigations. He also issued a burial permit and signed the postmortem report which he produced as "P. Exhibit No.4".

**PW9** No. 56883 Corporal Simon Lubuya was at all material time based in the Eldoret CID flying

squad department. He told the court that at the time, he was the Investigating officer assisted by the OCPD of Kiamumbi Police Post. He stated that on 23rd October 2009, he was sent to Kiamumbi Police Post to carry out the investigations. Whilst there, PW5, Inspector Emorom showed him motor vehicle No. KAN 516Q which was used in the incident where the deceased was killed. He towed the vehicle to Eldoret where photographs were taken and it was given back to the owner James Mwangi who recorded his statement with the police. He stated that the accused had the vehicle on the date of the incident and had had it since 20th October 2009. He testified that the said James Mwangi stated that he did not know where the accused person was since 20th October 2009. He tried calling him but his phone had been switched off. He said that Mr. Mwangi found his car impounded at Kiamumbi Police Post.

PW9 told the court that he later found out that the accused had surrendered himself to Nakuru Police Station where he was collected from and brought back to Eldoret. He interviewed him and later got a witness by the name Joshua Metto who could identify him as a person connected to the murder incident.

He further stated that Inspector Kiambi conducted an identification parade in which he was present and the accused was identified and taken to the State Counsel for consultation. He was charged for the offence of murder.

PW9 indicated to the court that upon interrogation of the accused he told him that when he found out that the motor vehicle in question was involved in a murder, he fled to Nanyuki first and then Nakuru because he feared for his safety.

PW9 stated that during the investigations he did not recover any exhibits and further narrated that though the owner of the motor vehicle was arrested, he was released after investigations revealed that he was not involved. He relinquished the car to Mr. Mwangi though the log book was in the names of one Kevin Ngure. He stated that he did so once Mr. Mwangi presented to him a sale agreement. The log book was produced in court as an exhibit.

On cross-examination, PW9 stated that the identification parade was done on 10th November 2009 and the accused was brought to Eldoret on 7th November 2009. He said that the accused had been in custody for 3 days when the parade was conducted. According to him, there were 9 people on the parade which was conducted at Eldoret Police Station. He stated that he attended the parade which was conducted at around 3:00 p.m and took a statement from Joshua Metto. He told the court that no legal representation was available for the accused.

In re-examination, the witness confirmed that he did not conduct the parade or investigations; he only attended the parade.

**PW10**, Dr. Joseph Embenzi produced the P3 form for Simon Gakuo Ndung'u. He stated that a mental assessment was conducted on the accused by one Dr. Nyaura who had since relocated to Uganda. The witness attested to the fact that he worked with Dr. Nyarua and his signature was familiar to him. PW10 therefore confirmed to the court that the accused was found mentally fit to plead.

**PW11**, was Joshua Kipkemboi Metto who told the court that the deceased person was known to him but not the accused. He testified that on 20th October 2009, he was at Rivatex Ndalat waiting for a vehicle when he saw two people on a *boda boda* heading towards a parked vehicle which he identified as a maroon Starlet. He did not however see the registration number of the vehicle. He further stated that he was about 20 to 30 meters away from the vehicle when the bonnet of the vehicle was opened and the passenger on the *boda boda* got off. He stated that the rider of the *boda boda* was grabbed by two persons who were standing outside the vehicle and they continuously struggled after which the *boda boda* rider was put into the vehicle while the passenger who stood by all along rode the motor-cycle. Then someone in the vehicle shouted "fire" and both the car and the motor cycle sped off. He indicated that he did not know what transpired thereafter until he

heard that a *boda boda* rider in Eldoret had been killed. On 10th November, 2009, he went and reported the matter at Eldoret Central (Police Station). He told police that he would be able to identify the people in the maroon car.

He went on to testify that he attended an identification parade in which he was a witness that was done at 3 p.m where there were more than 10 people. He picked out the one who was driving the car who he identified in court as the accused.

On cross-examination, PW11 reiterated that the accused person was not known to him prior to the date of the incident. He stated that he watched the incident from a distance of about 20-30 metres. Initially there were three people and after the *boda boda* arrived they became five. He was not however able to identify all of them. He identified his first written statement as well as the one he had recorded after the identification parade. He also maintained that he went to the police to report of his own accord after he heard that a *boda boda* person had been killed. He stated that he could not remember the position of the accused on the parade but he was around No. 9 on the line.

In re-examination, PW11 stated that he had not written any statement prior to the one he wrote on 10th November 2009. He stated that no one forced him to report the matter at the police station. He confirmed to the court that he wrote the statement himself.

**PW12**, No. 233472 Inspector Simon Kiambi testified that on 9th November 2009 he was in his office at Eldoret CID when he was asked to conduct an identification parade by the Investigation Officer. He stated that at 3:30 p.m eight members were arranged for an identification parade which the accused agreed to participate in even without representation. He chose to be placed between numbers 5 and 6 in the parade and the witness Joshua Metto was called and he identified him positively by touching him. The accused then indicated that he was satisfied with the parade and signed the ID parade forms. He too signed the form but he was not part of the investigating team.

On cross-examination, he stated that PW11 was outside when he was arranging the witnesses. He stated that the witness went straight to the accused and touched him thereby identifying him. He stated that the witness did not have fore knowledge of the accused nor had he told him anything. He maintained that the ID parade was not defective.

The accused gave a sworn statement of defence on 30th April 2013. He told the court that before his arrest he was a taxi driver, driving a maroon Toyota Starlet motor vehicle number KAN 516Q. He stated that he had been employed by PW2 James Mwangi. He further told the court that he was not involved in the murder of Wilson Kiprop. On 20th October 2009, between 10.00 and 11.00 a.m he was hired by two men from Eldoret Town to Kipkaren Estate where he drove them. The two men asked him to wait for them as they waited for others to come then he would take them all to Langas. He stopped at an SDA church gate and while waiting there, two people came in a motorcycle. These were a rider and a passenger and they arrived as he was opening the car bonnet to check the water and engine. He closed the bonnet and they told him to take them to Langas. They were now four people in the vehicle and the man who rode the motorcycle led them to a place in Langas where there was a pick-up and other people waiting. At this juncture, he was paid Ksh. 750/- for both trips. He left and took Ksh. 700/- to his employer's brother and went on with his work.

He further stated that later, on 22nd October 2009, he had left his vehicle parked outside a shop and went to visit a sick friend. He told the court that when he returned, he did not find his vehicle where he had parked it and onlookers told him that it had been towed away. Upon going home he found that his wife and child had been arrested. He sought advise from his friend John Karanja who told him not to go to the police immediately as he too may be arrested. He spent the night at his house and on the next day, he went to his uncle's house in Nakuru. On 24th October 2009, they went and reported the matter to the DCIO at Nakuru Police Station. The DCIO, Nakuru then made a call to Eldoret Police Station and was told that the vehicle the accused operated had been used to commit a crime.

The accused stated that he was arrested on 7th November 2011 in Nakuru and was escorted back to Eldoret. An identification parade was conducted thereafter and he was identified. He told the court that he would be able to identify the persons who hired him though he did not know their names. The persons who were on the motorcycle were also unknown to him, but the police never asked for his assistance in conducting investigations. He stated that he did not know the deceased, and whether he was one of his passengers and when he died.

In cross-examination, the accused stated that the persons who first hired him told him that they were going to Kipkaren, then Langas. He stated that when they were leaving, the passenger on the motorcycle rode the motorcycle and the one who was riding before entered the vehicle. He said that he saw one of the passengers who was at the road side being forced to enter the vehicle. He added that upon arrival at Langas, the person on the motorcycle was having a conversation with the men on the pick-up but he did not understand what they were saying. He stated that he did not take the registration number of the motorcycle or the pick-up when the passengers alighted and that the first two passengers were known to him as he had carried them (separately) about five other times before although he did not know where they worked. He stated that he had the phone number of one of the passengers in his phone but he did not know his name. He concluded that the police took away his phone and sim card and never asked him about the passengers.

### **SUBMISSIONS**

Learned Counsel, Mr. Miyianda, on behalf of the accused submitted that the prosecution did not demonstrate that the accused murdered the deceased. He stated that the accused was only hired to take people to their destination and was paid for those services. The money was delivered to PW2 on 20th October, 2009.

He submitted that since the accused did not know the deceased, he should have been used as a state witness. He stated that his defence was candid and honest which court should take into account. He urged the court to acquit the accused.

Learned state counsel Miss Ruto stated that she would rely on the evidence on record. She made no submissions.

### **EVALUATION OF EVIDENCE**

It is not disputed that the accused, until the 20th October, 2009 was in control of motor vehicle registration No. KAN 516Q owned by PW2. He had been employed as its driver. It operated as a taxi. This is the motor vehicle that was seen by PW1, 4 and 11 parked by the road and into it a boda boda man was bundled on 20th October, 2010.

PW1 described it as a maroon starlet car registration No. KAM 516Q. PW4 described it as a small maroon car whose registration number she did not recall. PW11 on the other stated that it was a maroon starlet car.

The description of this car exactly fitted that owned PW2 which he had charged the accused to drive. It also matched the car that was recovered by PW5. It is also the vehicle PW7 took photographs of and was handed over to PW9.

Each of the three witnesses also gave corroborative evidence on how a boda boda man who rode by was bundled into it after a brief struggle. In this regard PW1 testified as follows:-

***“I saw a car with bonnet open. The registration number KAM 516Q make Toyota starlet maroon colour. One side, I saw approximately three young men holding one down. One was crying for help. They bundled him into the car. There were a total of four persons. I could not help the person I was on the other side of the road .....”***

PW4 testified as follows:-

***“I was with my husband. We saw three guys fighting with one person. There were about three persons fighting with one person. There was another behind a motor cycle. Total of five persons. I was about fifty metres away from the scene of fighting. We get to the junction of Ndalat/Rai Road. We were with my husband. PW1 stood at the junction and the persons forced one of the persons into the car and sat on either side. The person on the motor cycle sped past us. We tried to stop but could not. We tried to stop the car and shouted what was happening. The occupants shouted that the person had been arrested for knocking someone at Langas and so they were taking him to Police Station.”***

PW11 on the other hand testified thus;

***“The registration number I did not see. I only saw the car. It was a starlet the colour was maroon. The passenger got off and the boda boda rider was grabbed. There were two other persons outside the car. The two struggled with the boda boda rider. The passenger looked on without doing anything. The boda boda rider was put into the vehicle and the passenger took the motor cycle and rode it.”***

Although none of the three witnesses strictly said they identified the boda boda man that was bundled into the maroon starlet car as the deceased, from the evidence of PW3, the deceased's brother, the deceased was himself a boda boda rider. He stated that on 20th October, 2009 the deceased left home with his motor cycle after indicating that he had taken it for repair. He was never to return. Coupled with this fact PW1, 4 and 11 were consistent that the man who was put in the car is the man who had arrived where the car was while riding the boda boda. He was forced into the car which immediately sped off. His passenger then took control of the boda boda and led the car away.

Furthermore, PW11 participated in the identification parade that was carried out by PW11. He positively identified the accused person as the man who was driving the maroon starlet car. The accused was described by PW1 and 4 as having participated in forcing the man on a motor cycle into the car. In all respect, I do not find fault with the manner in which the identification parade was held. I therefore hold that the identification of the accused in it was proper.

The story of PW1, 4 and 11 tallies with what the accused told the court. That he was hired by some men to take them to Langas. The men found him parked by the road side with the car bonnet open as was described by PW1 and 11. He was however unable to explain about his whereabouts between 20th and 22nd October, 2009. It is on the latter date that he said he parked his vehicle outside a shop but on returning back did not find it. But according to PW2, the accused's employer, he had last heard about him on 20th October, 2009 when he took the proceeds of the taxi to his brother. So, where was he on 21st October, 2009 and 22nd October, 2009?

Interestingly, he did not report the incident of the missing vehicle either to his boss or the police. And when he went home and found his wife and child arrested, he opted to flee far from his home, which in my view was a character of a guilty man. If indeed he was innocent, he would have had nothing to fear and would not have fled. Besides, as fate had it, that vehicle had not been towed away from outside a shop as he alleged. It was collected by police officers at Mwanzo area as an unattended vehicle.

What I am trying to say is that the accused's character and behaviour preceding the discovery of the deceased's body point a guilty finger at him. To further buttress this, it is important to note that he gave a sworn statement of defence. In that defence, he indicated he knew the person who had hired him and particularly that he had the phone number of one of them. But he never bothered to tell the police this fact. Such behaviour can only be construed to mean that he did not want to implicate his friends with whom he committed the heinous act and that all of them shared a common intention to do harm to the boda boda man. Unfortunately, this man turned out to be the

deceased – See the case of NJOROGE -VS- REPUBLIC (1983) KLR, 197, AT PAGE 204, the Court of Appeal Stated as follows:-

***“If several persons combine for a unlawful purpose and one of them in the prosecution of it kills a man, it is murder in all who are present whether they actually aided or abetted or not provided that the death was caused by the act of someone of the party in the course of his endeavours to effect the common object of the assembly.”***

And to further vindicate that the accused was in that assembly that killed the deceased, I borrow the words in the case of DICKSON MUNENE & ANOTHER -VS- REPUBLIC CRIMINAL APPEAL NO. 314 OF 2011. The Court of Appeal stated;

***“As to its proof, referring to its earlier decision in R -V- TABULAYENKA S/O KIRYA (1943) EACA, 51, it continued to state that:-***

*'The common intention may be informed from that presence, their actions and the omission of either of them to disassociate himself from the assault'.*

Further in the case of EUNICE MUSENYA NDUI V REPUBLIC CRIMINAL APPEAL NO. 534 OF 2010 the learned Court of Appeal Judges went to great lengths to expound on the doctrine of common intention citing cases such as WANJIRO D/O WAMERIO V REPUBLIC 22 EACA 521 which defined common intention as follows:-

***“Common intention generally implies a premeditated plan, but this does not rule out the possibility of a common intention developing in the course of events though it might not have been proven to start with.”***

*They also cited the Singapore case of VIHAY S/O KAHEVASAN AND OTHERS V PUBLIC PROSECUTOR [2010] 4 SSLR 1119 where the court observed that the doctrine of common intention involved four ingredients namely;*

- (i) The criminal act*
- (ii) The common intention*
- (iii) Whether the criminal act was done in furtherance of the common intention; and*
- (iv) Whether there was the requisite participation of the accused in the criminal act.*

*The preceding explanation in the case law of what constitutes a 'common intention' fits the definition given under Section 21 of the Penal Code, thus;*

***“21. When two or more persons form a common intention to***

***prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence.”***

The accused, though he had noticed that there was a struggle between the passengers as one of them was being bundled into the vehicle did not bother to disassociate himself with these assailants. Instead, he went ahead and took them where they wanted. Moreover, there was an indication that something was amiss with someone in the vehicle who was shouting “fire” as was stated by PW11 and the person leading them on the motor-bike speeding past curious on-lookers. Again, the accused too helped to bundle the 'boda boda' man into his vehicle. In those circumstances, it would not be absurd for the court to conclude that the whole incident was pre-

meditated and well planned before its execution and the accused person was in on the plan.

Let me emphasize that the deceased was reported missing in the same period this incident happened. As fate had it he was found dead. As told by PW3, his brother, he had left home with his motor cycle. So, all the facts on ground collated lead me to conclude that the man who was bundled into the car was the deceased and must have been killed by the same gang that snatched him away. And of course, among the gang members, was the accused himself.

I now determine whether the accused was possessed of mens rea to commit the offence. Needless to say, as I have earlier on indicated, the accused's own behaviour points at a guilty mind. He went missing for 15 days and was only found in Nakuru at his uncle's place. As PW5 testified he had earlier fled to Nanyuki. He also took no action after realizing that his wife and child were arrested and the car he was charged with was 'missing'. The behaviour of course, constitutes circumstantial evidence. But the same is so strong that it leaves no doubt in mind that he is guilty and that all factors crystalized together, leads me to conclude that he worked in cahoot with others to eliminate the deceased. Moreso, there is also the direct evidence of PW11 which incriminates him.

Further, the manner in which the deceased was forced into the car demonstrates that the assailants were upto no good. The drama that followed was equal to a kidnap. It had been premeditated he had to exit. He strongly fought the men who bundled him into the car but he was overpowered. And the accused's failure to report what I term as 'unusual behaviour of common customers' means that he possessed the intention to carry out the crime. That crime turned out to be heinous murder.

As to the fact of the death of the deceased, his body was found on 24th October, 2014 at Kapseret in a maize plantation. The post mortem done by PW8 proved that he died of strangulation, a demonstration of human factor leading to his death. And my conclusion is that I have no doubt in my mind that the accused participated in the crime. He must therefore be held culpable.

Finally, let me point out the issue regarding the discrepancy of the subject motor vehicle. PW1 and 2 gave its number as KAM 516Q. All other witnesses said it was KAN 516Q. Those who particularly came into contact with it confirmed it was KAN 516Q. As such, it follows that the motor vehicle was KAN 516Q. I opine that the error may have occurred in the recording by the court because letter 'M' may sound like letter 'N'. All the same, that minor discrepancy does not ouster the strong evidence against the accused.

In the upshot, I dismiss his defence as lacking in merit. It was a concocted story that could not bail him out. I find him guilty of the offence of murder contrary to Section 203 as read with Section 204 of the Penal Code and convict him accordingly.

**DATED and DELIVERED at ELDORET this 2nd day of October, 2014.**

**G. W. NGENYE – MACHARIA**

**JUDGE**

**In the presence of:**

Mr. Mwinamo holding brief for Miyienda for the Accused

Miss Mumu for the State